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Meijer, Inc. and Robert Lee Caldwell. Cases 9–CA–40631 and 9–CA–40778

June 29, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On August 31, 2004, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Respondent filed an answering brief to the General Counsel's cross-exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by prohibiting employee Robert Caldwell from distributing union literature and soliciting union membership at the entry gates to its distribution facility. We disagree.

Facts

The Respondent operates a distribution center in Tipp City, Ohio, and retail stores in the Dayton, Ohio area. The employees at the distribution center are currently represented by the United Food and Commercial Work-

ers Local 1099. Since September 2003,³ Caldwell has been involved in a campaign to replace that current Union with another labor organization, Real Union. On October 17, Caldwell distributed applications for Real Union membership at the turnstile-gated entrance to the Respondent's distribution facility. Union Steward Steve Cullen approached Caldwell, told him that the employees were already represented by a union, and demanded that Caldwell leave. After Caldwell refused, Cullen telephoned the Respondent's manager, Jack Evans, and informed him that someone was bothering people in the parking lot. Caldwell then finished his distribution and started to drive away. However, when he saw employee Lisa Patton, Caldwell stopped, got out of his truck, and handed Patton a flyer.

Meanwhile, Evans came out to investigate the complaint from Cullen. Observing Caldwell's improperly parked truck, Evans approached Caldwell and asked whether he was working. Caldwell responded that he was not on duty. Evans then told Caldwell that he had no business being there and directed Caldwell to leave. After Caldwell left, Evans obtained a flyer from Patton and forwarded it to the Respondent's manager, Matthew Jamrog.

Subsequently, Jamrog sent a letter to Caldwell, dated October 20, stating in pertinent part that:

Simply stated, our Solicitation Policy prohibits solicitations and/or distribution of any materials on company property (including sidewalks and parking lots) by non-team members for any purpose. Team members shall not engage in solicitation for any purpose during the working time of the person being solicited or the person doing the solicitation.

In addition, distribution of literature or other material of any kind is not allowed during actual working time or in any work area of any Meijer facility at any time. Materials will not be allowed to be posted or left laying around anywhere in our facilities.

This rule does not apply to break periods, meal periods or any other specified period during the work day when both the soliciting and solicited Meijer team member are on non-working time and in non-public, non-work areas. This means that both the solicitor and the team member must not be on the clock and must be in a non-work area: i.e., break-rooms. The company considers our store parking lots to be a "work area" since we have team members that work in this outside area of the store.

¹ We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by disparately enforcing its no-solicitation and no-distribution policy. The judge correctly found that while the policy prohibiting solicitation and distribution on worktime is presumptively valid on its face, the Respondent disparately enforced this policy by permitting employees, during worktime, to solicit for the Local 1099 campaign fund. We further note that while this issue was not explicitly alleged in the complaint, it was fully litigated, and there is no contention in the parties' exceptions that questions whether it was fully litigated.

Chairman Battista finds it unnecessary to pass on whether the solicitation and distribution policy was disparately enforced. As noted below, the Respondent's solicitation and distribution policy unlawfully prohibited employees from soliciting and distributing in the retail store parking lots. Accordingly, he finds that it is unnecessary to additionally find that the disparate enforcement of its policy is unlawful, as any such finding would not materially affect the remedy.

² We shall modify the judge's recommended Order to accurately reflect the violations found, including the additional findings herein, and we shall substitute a new notice to conform to the language set forth in the Order.

³ All dates hereafter are in 2003 unless otherwise indicated.

The Respondent also attached to the letter the no-solicitation/no-distribution policy, contained in the team member handbook, which states in pertinent part that:

The Company prohibits solicitation and/or distribution of any materials on Company property (including sidewalks and parking lots) by non-associate/team members for commercial, charitable or any other purpose. Associates/team members shall not engage in commercial, charitable or any other solicitations in non-sales working areas during their working time or the working time of the associate/team member being solicited. For purposes of the foregoing, "working time" does not include authorized break or meal periods or any other specified periods during the work day when the associate/team member properly is not engaged in performing work tasks. Associates/team members shall not engage in such solicitation or distribution in sales or guest contact areas at any time. Associates/team members shall not at any time engage in distribution of any materials of any sort in any work areas.

The Judge's Recommended Decision

The judge found that Evans did not violate Section 8(a)(1) by unlawfully interfering with Caldwell's protected activity because Evans did not know that Caldwell was engaged in union distribution when he directed Caldwell to leave the parking lot. Rather, the judge found that the General Counsel failed to meet the asserted burden of proving that Evans knew Caldwell was engaging in protected activity when he directed Caldwell to leave. The judge further found that, even assuming that the General Counsel had demonstrated Evans' knowledge of Caldwell's protected activity, the October 20 letter repudiated the illegal conduct because it assured Caldwell that, in the future, he would be permitted to distribute literature in the distribution facility parking lot.

Analysis

Contrary to the judge, for the reasons more fully set forth below, we find that the October 17 incident violated Section 8(a)(1).

First, we find that the judge erred in imposing a burden upon the General Counsel to show that Evans had knowledge of Caldwell's protected activity when he directed Caldwell to leave. "[I]t is well established that evidence of employer knowledge is not a necessary element of an 8(a)(1) violation. Rather, the test is whether the Respondent's conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights." *Alliance Steel Products*, 340 NLRB No. 65, slip op. at 1 (2003). Applying the appropriate standard, we find that Evans' conduct to-

wards Caldwell would reasonably tend to interfere with Caldwell in the exercise of his protected activity.⁴ Moreover, the impact of Evans' conduct is not diminished by the absence of evidence that Evans knew that Caldwell was engaging in protected activity at that time.

Second, we find, contrary to the judge, that the Respondent's October 20 letter to Caldwell failed to effectively repudiate Evans' unlawful conduct. In that letter, the Respondent prohibited solicitation and distribution in the retail store parking lots.⁵ However, there is no evidence that those parking lots are indeed "work areas," as the Respondent contends. Although the letter asserts that employees perform some minimal work in parking lots, that work is not integral to its business. That is, employees simply retrieve shopping carts and assist customers to load purchases into cars. Thus, the Respondent's prohibition of solicitation and distribution in these areas violates Section 8(a)(1). See generally, *National Steel Corp.*, 173 NLRB 401 (1968), *enfd.* 415 F.2d 1231 (6th Cir. 1969) (holding that prohibiting distribution in parking lot unlawfully restricts distribution in a nonwork area).⁶

In order for a repudiation to be effective, it must be made in a context free of other related proscribed illegal conduct. See *Red Arrow Freight Lines*, 289 NLRB 227 fn. 1 (1988) (employer's attempted repudiation of an unlawful "no-solicitation" instruction not effective where posting occurred in the context of other unremedied unfair labor practices). Because the letter contained an unlawful prohibition on solicitation and distribution, we find that it did not constitute an effective repudiation of Evans' prior unlawful conduct.⁷

⁴ Although Caldwell was not specifically told by Evans that he was not allowed to distribute union literature in the distribution center parking lot during nonworktime, Member Schaumber nevertheless finds that Evans' conduct would reasonably tend to interfere with Caldwell's exercise of his Sec. 7 rights. Because Caldwell was told to leave the parking lot shortly after he was engaged in distribution, he would reasonably relate his ejection to that distribution. This would tend to discourage him from engaging in similar activity in the future. Moreover, even if Caldwell's ejection from the parking area was not reasonably perceived to be directly related to his distribution of union literature, the act of telling an employee that he is not allowed to be in the parking lot during nonworktime would reasonably tend to discourage that employee from returning to the parking lot to engage in future protected activities. Accordingly, Member Schaumber finds that Evans' conduct had the reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights.

⁵ The letter states that "store parking lots" are work areas.

⁶ We thus adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by promulgating and maintaining, in its handbook, an overly broad policy prohibiting employees from engaging in union solicitation and distribution in the parking lots and other exterior areas of its retail stores.

⁷ In agreeing that the Respondent's October 20 letter to Caldwell did not constitute an effective repudiation of Evans' prior unlawful conduct, Chairman Battista and Member Schaumber do not pass on the

Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(1) by preventing Caldwell from distributing union literature outside the distribution facility at a time when he was not scheduled to work.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Meijer, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting off-duty employees from distributing union materials in the parking lots and other exterior areas of its distribution facility.

(b) Promulgating, maintaining, or enforcing a policy prohibiting employees from engaging, during nonworking time, in solicitation and the distribution of literature in the parking lots and other exterior areas of its retail stores and distribution facilities.

(c) Promulgating, maintaining, or enforcing a policy permitting solicitation for one union but prohibiting solicitation for other unions.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the no-solicitation/no-distribution policy, contained in the team member handbook, and the letter of October 20, 2003, and notify its employees, in writing, that it has done so.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rule has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute revised handbooks that (1) do not contain the unlawful rule, or (2) provide the language of a lawful rule.

(c) Within 14 days after service by the Region, post at its Tipp City, Ohio distribution facility and Dayton, Ohio area retail stores copies of the attached notice marked

validity of all the factors required for an effective repudiation as set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). See *Champion International Corp.*, 339 NLRB 672 fn. 6 (2003). Member Liebman adheres to the test for finding an effective repudiation set forth in *Passavant Memorial Area Hospital*, supra. In addition to the reason relied on by her colleagues, she would find that the Respondent failed effectively to repudiate its unlawful conduct here because the Respondent's October 20 letter to Caldwell did not make reference to its unlawful conduct, nor acknowledge that Caldwell is permitted to distribute flyers in the distribution center parking lot.

"Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 17, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 29, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you, while off-duty, from distributing union materials in the parking lots and other exterior areas of the distribution facility.

WE WILL NOT promulgate, maintain, or enforce a policy prohibiting employees from engaging during non-working time, in solicitation and the distribution of literature in the parking lots and other exterior areas of our retail stores and distribution facilities.

WE WILL NOT promulgate, maintain, or enforce a policy permitting solicitation for one union but prohibiting solicitation for other unions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unlawful no-solicitation/no-distribution policy contained in the team member handbook, and in our letter of October 20, 2003, reaffirming that policy, and WE WILL furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rule has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute revised handbooks that (1) do not contain the unlawful rule, or (2) provide the language of a lawful rule.

MEIJER, INC.

Julius U. Emetu II, Esq., for the General Counsel.

Jeffrey S. Rueble, Esq., of Grand Rapids, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on May 24, 2004. The charge in Case 9-CA-40631 was filed October 21, 2003,¹ and the complaint was issued December 30, 2003. The charge in Case 9-CA-40778 was filed January 5, 2004, and a consolidated complaint was issued on February 26, 2004.

The consolidated complaint alleges that the Respondent, Meijer Stores, Inc., violated Section 8(a)(1) of the National Labor Relations Act (the Act) by (1) telling an employee on October 17 that he could not distribute union literature at the entry gates to its distribution facility and (2) promulgating and maintaining a rule since October 20 prohibiting employees from soliciting and distributing literature in the parking lots and other exterior nonworking areas of its retail stores. The Re-

spondent filed an answer admitting the jurisdictional aspects of the consolidated complaint and denying that it violated the Act.

At the hearing, the parties were afforded a full opportunity to call and examine witnesses, present oral and written evidence, argue orally on the record and file posthearing briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation headquartered in Grand Rapids, Michigan, is a food and general merchandise retailer that operates a distribution center in Tipp City, Ohio, and retail stores in the Dayton, Ohio area. The Respondent derives annual gross revenues in excess of \$500,000 at its Dayton-area stores, and purchases and receives at the distribution center goods valued in excess of \$50,000 directly from points outside the State of Ohio. The Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The October 17 Incident*

For the past 8 years, Robert Caldwell has been employed by the Respondent as a warehouse clerk at its distribution facility in Tipp City, Ohio. The distribution facility consists of four warehouse buildings—801, 802, 804, and 805. Caldwell is currently assigned to building 802. As a precondition of employment, he is registered as a member of the United Food and Commercial Workers Local 1099 (the Union). However, for some time, Caldwell has not been pleased with the Union's labor representation. As a result, in September 2003, Caldwell began a campaign to replace the Union with another labor organization. He called his movement the "Real Union" and formed a Real Union website. Since that time, Caldwell has solicited coworkers during his lunch and break periods at the distribution facility, and by distributing flyers to employees in two of Respondent's Dayton-area retail store parking lots. Caldwell's solicitation activities at the distribution facility were consistent with the Respondent's policy of permitting employees to participate in sports betting pools and charitable fundraising during their break and lunch periods, which constituted nonworktime. However, the Respondent's solicitation policy was superceded partially by its collective-bargaining agreements with five different union locals, which permitted union representatives to solicit, during worktime, employee participation in the "Active Ballot Club," a political campaign contribution fund. The only qualification attached was that such activities not unduly disrupt the Respondent's business.²

² Caldwell and the Matthew Jamrog, the Respondent's manager of collective bargaining and administration, agreed that the Respondent's solicitation policy, as set forth in the "team member handbook" permitted solicitation in nonwork areas during nonworktime, as well as the exception for the "Active Ballot Club." R. Exh. 2; Tr. 29–30, 124–128.

¹ All dates are 2003, unless otherwise indicated.

After getting off early from the first work shift on the afternoon of October 17, Caldwell drove his pickup truck from the building 802 parking lot to the parking lot for buildings 801 and 805. Ed Kennedy, another building 802 employee, accompanied him. Caldwell parked near the turnstile-gated entrance to buildings 801 and 805. Caldwell stood near the entrance, but was not blocking it. When he arrived, employees were still leaving the first shift and others were arriving for the second shift. Caldwell handed out applications for Real Union membership, while Kennedy stayed in the vehicle. He handed out about 100 applications and the distribution was uneventful, until Chris Cullen, a union steward, confronted him. Cullen swore at Caldwell, told him that employees were already represented by the Union and demanded he leave. Caldwell resisted and continued distributing flyers. Frustrated in his endeavor to stifle Caldwell, Cullen said, "I'll take care of this." As he walked toward the entry gate, Cullen pulled out his cellular telephone. Unbeknownst to Caldwell, Cullen was calling Jack Evans, the Respondent's loss prevention manager at the distribution center. Clearly misstating the situation, Cullen told Evans there was a disturbance in the 801 parking lot and someone was bothering people there.

When Caldwell finished handing out applications, he got in his truck and started to leave. However, he stopped the vehicle after observing another employee and union shop steward, Lisa Patton, get out of her car and walk toward the turnstile. Caldwell got out of his vehicle and gave her an application. He did not have any other flyers in his hand.³ At this point, Caldwell's vehicle was 20–30 feet from the entrance.

In the meantime, based on Cullen's representations, Evans went to the parking lot to investigate. When Evans got there, he saw about 12 to 14 employees lined up at the entrance. Evans did not see a disturbance, but noticed a white pickup truck parked in the travel portion of the parking lot.⁴ He saw Caldwell standing next to the open driver's side door of the truck and another person sitting in the truck. Evans, knowing that Caldwell worked in building 802 on the other side of the complex, assumed he was the subject of Cullen's complaint. Caldwell was also concerned that Evans' truck was parked in the travel portion of the parking lot. As a result, Evans walked over to him and asked if he was "off the clock." Caldwell informed Evans he was off duty. Evans responded that Caldwell had no business being there and asked him to leave. Caldwell responded that he had a right to be there. When Evans repeated his directive, Caldwell said, "[W]e'll see about that," got in his truck and left. Caldwell never said anything about passing out union flyers. After Caldwell left, Evans saw Patton standing nearby with a piece of paper in her hand. Evans approached Patton and asked what Caldwell gave her. She told Evans that it was an application for membership in Real Union. At Evans request, Patton gave him the flyer. Evans took the form back to

his office and reported the incident to Rick Hershberger, director of the distribution facility. Hershberger told Evans to submit a report to Matthew Jamrog, the Respondent's manager of collective bargaining and contract administration.⁵

B. The October 20 Letter

On October 20, the next workday, Evans met and discussed the October 17 incident with Jamrog. Later that day, Evans distributed a memorandum to security staff explaining that employees were permitted to pass out union literature in the distribution facility parking lot during nonworktime. In addition, Jamrog sent a letter to Caldwell by certified mail outlining the Respondent's solicitation policy.⁶ The letter, which was received by Caldwell on or shortly after that date, and stated in pertinent part:

Based on your recent distribution of materials on Meijer property we have been receiving questions regarding our "Solicitation Policy." I would like to re-affirm our policy regarding this matter.

Simply stated, our Solicitation Policy prohibits solicitations and/or distributions of any materials on company property (including sidewalks and parking lots) by non-team members for any purpose. Team members shall not engage in solicitation for any purpose during the work time of the person being solicited or the person doing the solicitation.

In addition, distribution of literature or any other material of any kind is not allowed during actual working time or in any work area of any Meijer facility at any time. Materials will not be allowed to be posted or left laying around anywhere in our facilities.

This rule does not apply to break periods, meal periods or any other specified period during the work day when both the soliciting and solicited Meijer team member are on non-working time and in non-public, non-working areas. This means that both the solicitor and the team member must not be on the clock and must be in a non-work area, i.e., breakrooms. The company considers our store parking lots to be a "work area" since we have team members that work in this outside area of the store.

At no time will we allow a non-team member or team members from other units/stores to be in the backrooms or

³ I credit the testimony of Patton that Caldwell did not have any other flyers in his hand. Tr. 96. Caldwell's testimony—that he had driven about 20 feet when he saw Patton, stopped his vehicle, got out to hand her a flyer—supports a strong inference that he did not have any other flyers in his hand when approached by Evans. Tr. 60.

⁴ Caldwell conceded on cross-examination that he was not parked in a parking space. Tr. 36–37.

⁵ Due to the significant inconsistencies in Caldwell's testimony on this issue, I did not credit his assertion that he handed one of the flyers to Evans prior to being told by the latter that he had to leave. Caldwell testified at trial that, when Evans approached him in the parking lot, Evans touched his shoulder and asked, "[W]hat have you got there, what are you doing." Caldwell allegedly responded by handing Evans a flyer and telling him that he was passing out applications for the Real Union. Tr. 21. However, Caldwell contradicted this testimony in an affidavit sworn to on December 19, 2003. In that affidavit, Caldwell failed to mention that he handed Evans a copy of the flyer, that Evans touched his shoulder or asked him what he was passing out. Tr. 39–40. On the other hand, I found Evans and Patton to be credible witnesses. As such, I credit the consistent testimony of both that, as Evans approached Caldwell, the latter had nothing else in his hands. Evans and Patton each testified that it was she who gave Evans a copy of the flyer after Caldwell drove away.

⁶ R. Exh. 1.

breakrooms of other units/stores to solicit team members. They must stay only in areas where the general public is allowed, and cannot solicit team members that are in work areas or on the clock.

Finally, our telephone, telephone lines, fax machines, copy machines and all business equipment are for business use only and are not to be used for any non-business reasons.

These and other policies are set forth in the Team Member Handbook. I have enclosed a copy the handbook for your reference. Hopefully, the handbook and this letter will clarify any questions you may have regarding our Solicitation Policy. If you have any other questions in the future, please do not hesitate to contact me at (616) 791-5450.

In fact, the October 20 letter did not reaffirm the Respondent's solicitation policy. The letter specifically stated that solicitation and distribution were not permitted in the retail store parking lots and implied that such activity was permitted in the distribution facility parking lot. However, the actual policy, which was contained in the team member handbook, prohibited such activity in *all* of the Respondent's parking lots and sidewalks:

Non-Solicitation/Non-Distribution and Non-Trespass Policy

Policy No: 079 Revision: 1 Effective: 06/08/94

The Company prohibits solicitation and/or distribution of any materials on Company property (including sidewalks and parking lots) by non-associate/team members for commercial, charitable or any other purpose. Associates/team members shall not engage in commercial, charitable or any other solicitations in non-sales working areas during their working time or the working time of the associate/team member being solicited. For purposes of the foregoing, "working time" does not include authorized break or meal periods or any other specified periods during the work day when the associate/team member properly is not engaged in performing work tasks. Associates/team members shall not at any time engage in distribution of any materials of any sort in any work areas.

To further explain to the general public our general policy, we post the following notice:

NOTICE TO THE PUBLIC

Solicitation or distribution of literature or other matter and trespass by members of the public and/or non-Meijer employees is prohibited on this property.

Within 2 weeks after the October 20 letter was issued, Caldwell ran into Evans and asked for clarification of the letter. Evans referred Caldwell to Mike Sullivan, the building 802 supervisor. Caldwell complied and spoke with Sullivan. Specifically, Caldwell wanted to know whether the letter authorized solicitation in the distribution facility parking lots. Sullivan said he would consult with Jamrog and get back to him. Within a day, Sullivan informed Caldwell he could distribute literature in the distribution facility parking lots, with certain restrictions: the distribution had to be during nonworktime;

flyers could not be placed on windshields; and neither harassment nor littering would be permitted.⁷ Nevertheless, after the October 17 incident, Caldwell stopped distributing literature in the distribution facility parking lots. Caldwell's inaction was attributable to a change in his work schedule, which made it made difficult to catch other employees during shift changes, and "a lack of positive response" from employees. It was not attributable to the October 20 letter.⁸

C. The Retail Store Parking Lot

The October 20 letter and Sullivan's subsequent statement to Caldwell informing him that he could solicit coemployees in the distribution facility parking lots reaffirmed the Respondent's prohibition against solicitation and distribution in the Respondent's store parking lots.⁹ Respondent's rationale for its no-solicitation policy in store parking lots, as stated in the team member handbook, is that those areas constitute work areas. In determining whether its store parking lots constitute work areas, a review of the activities at one of the Respondent's typical Dayton-area stores is appropriate.

A typical store operated by the Respondent in the Dayton area is store 102 in Kettering.¹⁰ Store 102 is open 24 hours a day, 7 days a week. The store occupies a 4.5-acre portion of the 46-acre property. The store's parking lot extends over 10-15 acres and has approximately 1000 parking spaces. The remainder of the property consists of wooded areas, grass, and retention ponds.¹¹

The type of work performed in the store 102 parking lot consists of periodic work activity and sporadic work activity. Periodic work activities are performed by utility clerks and security guards. Security guards periodically patrol the parking lot, while utility clerks push and collect shopping carts. Each store utilizes approximately 50 to 80 utility clerks. Each utility clerk collects approximately 86 shopping carts per hour, helps customers load purchases into vehicles about 30 times per workday, and collects trash. In addition, employees from the Respondent's gas station on the outer edge of the property carry

⁷ The exact date of Caldwell's request for clarification of the October 20 letter was unknown. Caldwell estimated that it occurred "roughly two weeks" later, while Sullivan testified that Caldwell approached him later that week or the following week. The exact timing of their conversation is inconsequential. Tr. 25-26, 106-107.

⁸ At the hearing, Caldwell claimed that the October 20 letter deterred him from further distribution of union literature. Tr. 51. However, he conceded in his December 19 affidavit that he stopped distributing literature due to a change in his schedule to a 6-day workweek, which made it difficult to "catch other employees as they begin and end their shifts." Tr. 56-57.

⁹ As previously discussed, the letter and Sullivan's statement assured Caldwell of his Sec. 7 right to distribute and solicit in the distribution facility parking lot. However, the no-solicitation policy contained in Respondent's employee handbook, which remained in effect, continued to prohibit such activity in *all* of Respondent's facilities.

¹⁰ Ken Barclay, an employee of nearly 21 years, has been the director of six Meijer stores over the past 10 years. He testified that the Kettering store was similar in size and layout to the other four Dayton-area stores located at Harshman Road and in Springboro Pike, Englewood, Beaver Creek, and Troy.

¹¹ R. Exh. 3.

cash or materials through the parking lot to or from the store. Sporadic activities are performed by utility clerks and contractors. Utility clerks occasionally trim bushes and trees, and shovel snow in limited areas—along the front of the store, in front of fire exits, and handicapped parking spaces. They wear safety reflective vests to make them visible to moving vehicles. Contractors are employed to mow grass, paint stripes, and clean, sweep, or plow snow in the parking lot.

Portions of the parking lot and areas immediately outside the store are also used sporadically for displaying, selling and storing products, and promotional activities.¹² Seasonal products, such as lawnmowers, gas grills, swing sets, and pools, are displayed between the two entrances in front of the stores. Store clerks occasionally operate periodic garden and sidewalk sales. In addition, companies such as NASCAR, United Way, and Coca Cola are permitted to hold promotional events in the parking lot.

On an average day, store 102's parking lot experiences significant customer and employee activity. Store 102 has approximately 7000 daily transactions; on Saturdays, it averages 9000–9500 transactions. During holiday seasons, the store has in excess of 10,000 daily transactions. The number of store transactions generally reflects the number of customer vehicles utilizing the parking lots. However, while cold statistics are informative, the most meaningful evidence of a day in the life of store 102's parking lot can be gleaned from security videotape generated by the Respondent in the regular course of business.

Videotape of store 102's parking lots during the period of 4:24 to 7 p.m. on May 15, 2004, depicts typical customer and employee activity on a Saturday afternoon.¹³ The videotape, which runs at double the speed of real time, shows footage from three video cameras positioned on the store's roof. The cameras continuously rotate in providing varying views of the main parking area in front of the store and the garden center parking lot adjacent to the right side of the store.¹⁴ The camera on the left side of the store is marked "west." The camera on the right side of the building is marked "east," while the camera in between them is marked "center." During the videotaped period, the parking lot was approximately half full. All three cameras revealed a significant amount of empty parking spaces in the outer portions of the parking lot. The west camera showed vast open areas on the left side of the main parking area. The east camera showed vast open areas on the right side of the main parking area and the garden center parking area. The cameras also showed a constant, but slight, flow of pedestrian and vehicular traffic throughout the main parking lot.

¹² Jamrog could not say the frequency that Respondent has such vendor events or sidewalk sales in the parking lot.

¹³ The videotape was received in evidence with the understanding that the parties would subsequently determine what portion of the tape to submit into the record. In a letter, dated June 2, 2004, the parties reported their agreement that the portion of the tape between 1624 hours (4:24 p.m.) and 1900 hours (7 p.m.) be received in evidence. The letter has been received in evidence as Jt. Exh. 2.

¹⁴ None of the videotapes cover the loading docks on the left side of the store.

Utility workers can be seen pushing shopping carts on four occasions.¹⁵

Store 102 has approximately 425 employees, 90–95 percent of whom are covered by the Respondent's collective-bargaining agreement with the Union. However, one seeking to solicit employees in the parking lot during nonworktime would not be able to distinguish every employee from a customer for several reasons. First, store employees park throughout the parking lot. The Respondent urges employees to park in the outer portions of the parking lot, but they generally ignore that request. Second, employees start or leave work at various times, do not have set shifts and enter and leave each store through the same entrances and exits used by customers. Lastly, while some employees arrive to or leave work wearing the Respondent's mandatory clothing,¹⁶ others change into or out of their work clothes in the store locker room.

III. DISCUSSION

A. The October 17 Incident

The General Counsel asserts that the Respondent violated Section 8(a)(1) by prohibiting Caldwell from distributing literature and soliciting union membership in the distribution facility parking lot on October 17. The Respondent does not dispute that Caldwell engaged in concerted, protected activity by distributing union flyers in the distribution parking lot on October 17. However, it does contend that Evans, the security manager who directed Caldwell to leave the parking lot that day, was unaware Caldwell had been engaging in union activity. Furthermore, assuming, arguendo, that Evans knew about Caldwell's union activity, the Respondent took prompt and effective action to repudiate any unlawful conduct.

Section 7 of the Act provides, in pertinent part, that "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." An employer who interferes with, restrains, or coerces employees in the exercise of such rights violates Section 8(a)(1). The test does not turn on the employer's motive or whether the coercion succeeded or failed, but rather, whether the employer engaged in conduct, which it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959).

The evidence established that Evans was not aware of Caldwell's union activities when he told him to leave the distribution facility parking lot on October 17. Evans testified credibly that he approached Caldwell after receiving a telephone call from Cullen complaining that an unnamed person was bother-

¹⁵ Barclay opined that the activity shown on the videotape is "an average of the day," while the period of 5:30 to 6:30 p.m. is the busiest time of the day. Tr. 181–184; R. Exh. 4.

¹⁶ Store employees are required to wear name badges on company-issued red or teal colored polo shirts and black or khaki colored pants.

ing people in the parking lot. Evans conceded he did not see a disturbance, but approached Caldwell because he saw him standing next to his truck, which was parked in a strange spot in the travel portion of the parking lot; Patton was standing nearby. Evans also knew Caldwell worked on the other side of the distribution facility and asked if he was “on the clock.” After Caldwell informed him that he was on nonworktime, Evans told him to leave. Caldwell responded that “we’ll see about that” and drove away. It was after Caldwell left that Evans asked Patton what she had in her hand. Patton showed Evans the flyer and agreed to let him have it. Evans then submitted the flyer to management for advice as to how his staff should handle solicitation in the future. Evans’ version of the events was corroborated by Patton, whom I also found credible.

Caldwell, on the other hand, was not credible in his rendition of the facts surrounding the incident of October 17. As previously explained, that portion of Caldwell’s trial testimony was fraught with inconsistencies. In his sworn affidavit to the General Counsel on December 19, Caldwell omitted any reference to the following events as alleged at trial: that Evans approached him in the parking lot, placed an arm on his shoulder and asked what he had in his hand; and that Caldwell then handed Evans a flyer and told him he was passing out applications for Real Union. Accordingly, the General Counsel failed to meet his burden of proving that Evans knew Caldwell was engaged in concerted protected activity when he asked him to leave the parking lot on October 17.

Assuming, arguendo, that the General Counsel had demonstrated knowledge on the part of Evans at that time, the October 20 letter repudiated his illegal conduct. The letter was sent to Caldwell by Jamrog the next business day and assured Caldwell that, in the future, he would be permitted to distribute literature in the distribution facility parking lot. Accordingly, the October 20 letter was timely and cured any violation of Section 8(a)(1) with respect to the October 17 incident. *Passavant Memorial Area Hospital*, 237 NLRB 138, 139 (1978); *Atlantic Forest Product, Inc.*, 282 NLRB 855, 872 (1977).

B. The Respondent’s Distribution and Solicitation Policy

The General Counsel also asserts that the Respondent violated Section 8(a)(1) by promulgating and maintaining a rule prohibiting employees from distributing any literature in the parking lots and other exterior nonwork areas of its retail stores. The Respondent contends that it may legally maintain such a policy because its store parking lots constitute work areas “where therefore, solicitation and distribution could create traffic and safety hazards and embroil customers in union organizational activity.”¹⁷

The Section 7 right of employees to engage in union solicitation at their place of business is limited only by an employer’s legitimate interest of maintaining production and workplace discipline. *United Services Auto Assn.*, 340 NLRB No. 90, slip op. at 3 (2003); *Daylin Inc.*, 198 NLRB 281 (1972). Accordingly, the Board has long presumed lawful rules restricting union solicitation or distribution when employees are expected to be working. *Star-Brite Industries*, 127 NLRB 1008, 1010

(1960). Employers may also ban solicitation and distribution in the working areas of their facilities in order to prevent hazards to production. *Stoddard-Quirk Mfg.*, 138 NLRB 615, 619 (1962). However, an employer violates Section 8(a)(1) if it fails to enforce a no-solicitation rule against similar activities, while simultaneously enforcing the rule against union solicitation or distribution. *St. Vincent’s Hospital*, 265 NLRB 38, 40 (1982).

On the other hand, a prohibition on communication among employees cannot be so broad that it prohibits communication during paid nonwork periods such as breaks and lunchbreaks or during unpaid work periods, such as before and after work, if the employees are lawfully on the employer’s premises. Such broad prohibitions are presumptively invalid. *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994); *St. John’s Hospital*, 222 NLRB 1150 (1976). Similarly, absent adequate business justification, it is a violation of 8(a)(1) for an employer to promulgate, maintain, or enforce a rule prohibiting off-duty employees from soliciting or distributing literature in the employer’s parking lots and other outside nonwork areas. *St. Luke’s Hospital*, 300 NLRB 836, 837 (1990), *Orange Memorial Hospital*, 285 NLRB 1099 (1987); *Tri-County Medical Center*, 222 NLRB 1089 (1976). Such Section 7 organizational rights also attach to off-duty employees, like Caldwell, seeking such access at facilities other than those where they work. *Hillhaven Highland House*, 336 NLRB 646, 648 (2001).

Nevertheless, the Respondent maintains that its parking lot and the exterior areas around its stores are working areas. In order to constitute a work area, an area must be integral, not merely incidental, to the employer’s main function. *Santa Fe Hotel & Casino*, 331 NLRB 723, 730 (2000) (security, maintenance, and gardening at entrances outside hotel-casino incidental to main functions of lodging and gambling); *U.S. Steel Corp.*, 223 NLRB 1246, 1248 (1976) (work tasks such as “cleaning up, maintenance or other incidental work, are performed at some time in almost every area of every company”); *National Steel Corp.*, 173 NLRB 401, 403 (1968), enfd. 415 F.2d 1231 (6th Cir. 1969) (existence of security guards did not convert parking lot, streets, passageways, and sidewalks into working areas).

The primary purpose of the Respondent’s retail store parking lots is to provide customer and employee parking. They are also places where employees perform a variety of periodic or sporadic work activities. Utility clerks periodically retrieve shopping carts and, as necessary, assist customers load purchases. Sporadically, the Respondent’s employees display merchandise or conduct sidewalk sales and other promotional events. Unlike the stores, there are no employees permanently stationed in the parking lots, there are no cash registers and no constant customer-employee interaction. There are also occasions when other companies are permitted to hold promotional events, like NASCAR racing, United Way fundraisers, and Coca Cola-sponsored children’s activities. However, these functions are merely incidental to the Respondent’s primary function—the business of selling merchandise inside its stores. Indeed, the Respondent treats its parking lots as an incidental function by permitting its employees to flout the directive to park on the outer portions, thereby preventing customers from parking closer to the store.

¹⁷ R. Br. at 21.

As depicted in videotape of store 102's parking lot, there is a continuous, albeit dispersed, flow of pedestrian and vehicular activity throughout the parking lot on a typical day. However, the activity shown failed to reveal the performance of a significant amount of work in the parking lot, which was half full. Utility clerks collected and pushed shopping carts on several occasions, but none are seen assisting customers. There was no evidence of a sidewalk sale or any type of promotion. There was also no indication of how union solicitation or literature distribution to off-duty employees would create a littering hazard and safety risks for utility workers and customers.

Under the circumstances, the Respondent failed to demonstrate a business justification for its broad prohibition against the solicitation and distribution in the Respondent's store parking lots and exterior nonworking areas. *Ohio Masonic Home*, 290 NLRB 1011 (1988). Furthermore, the policy, as set forth in the Respondent's employee handbook, remains in effect as to all of the Respondent's facilities, including the distribution center. The October 20 letter to Caldwell did nothing to modify that policy, which continues to apply to all employees. Accordingly, the Respondent's no-solicitation policy is overly broad as it applies to union solicitation and distribution, during employees' nonworktime, in the distribution facility parking lot and its retail stores.¹⁸ On this basis, the Respondent's policy constitutes an unfair labor practice in violation of Section 8(a)(1). However, the legal consequences flowing from Respondent's illegal no-solicitation/distribution rule do not end there.

The employee handbook rule prohibiting solicitation or distribution during the working time is presumptively valid on its face. Nevertheless, Respondent disparately enforced the rule by agreeing to a collective-bargaining provision permitting employees, while working, to engage in campaign activity on behalf of the Union—the Active Ballot Club—but then refusing to permit employees in other types of union solicitation. Other solicitation would include Caldwell's criticism of the Union and advocacy for a new union. The record is devoid of any evidence tending to show that such a ban on Section 7 rights—in contrast to specific advocacy for the Active Ballot Club—is necessary for the operation of its stores or for the maintenance of discipline or security in its parking lots. Accordingly, the presumption of validity attaching to Respondent's no-solicitation rule as it related to working time activity was invalidated by its unfair and disparate application. *Capitol Records, Inc.*, 233 1041, 1045–1046 (1977), citing *Star-Brite Industries*, 127 NLRB at 1010 (“presumptions [of validity attaching to a rule prohibiting solicitation] may be overcome . . . by evidence establishing an unfair application of the rule”). Accordingly, I conclude that by disparately enforcing the handbook rule to preclude solicitation and distribution not otherwise

related to the Active Ballot Club, the Respondent violated Section 8(a)(1).¹⁹

CONCLUSIONS OF LAW

1. Meijer, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By promulgating and maintaining a policy prohibiting employees from engaging, during nonworking time, in solicitation and the distribution of literature in the parking lots and other exterior areas of its retail stores and distribution facilities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

3. By promulgating, maintaining and enforcing a policy prohibiting employees from soliciting during working time, while simultaneously permitting employees to engage in a specific type of solicitation on behalf of the Union during working time, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

4. By engaging in the conduct described above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. The Respondent did not further violate the Act as alleged at paragraph 4(a) of the consolidated complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

The Respondent, Meijer, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, or enforcing a rule or policy that prohibits its off-duty employees from engaging in union solicitation and distribution in the parking lots and other exterior areas of its Tipp City, Ohio distribution facility and Dayton, Ohio-area retail stores located at Harshman Road and in Kettering, Springboro Pike, Englewood, Beaver Creek, and Troy.

(b) Promulgating, maintaining, or enforcing a rule prohibiting its employees from engaging in union solicitation during working time, unless such activities would unduly disrupt the Respondent's business.

¹⁸ The consolidated complaint only alleged a violation as to the applicability of Respondent's policy to the parking lots and other exterior areas of its stores. However, the issue was fully litigated and evidence received of the employee handbook rule regarding solicitation and distribution at all of Respondent's facilities. See *Facet Enterprises v. NLRB*, 907 F.2d 963, 969–975 (10th Cir. 1990).

¹⁹ The theory of disparate enforcement of Respondent's no-solicitation rule to working and nonworkingtime activities was neither pled nor argued by the General Counsel. However, this issue was also fully litigated with the testimony from both sides regarding the Active Ballot Club.

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind policy 079 in the team member handbook and the letter of October 20, 2003. Furthermore, the Respondent shall notify its employees, in writing, that it has done so.

(b) Within 14 days after service by the Region, post at its Tipp City distribution facility and Harshman Road, Springboro Pike, Englewood, Beaver Creek, and Troy, Ohio retail stores copies of the attached copies of the attached notice marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 20, 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 31, 2004

²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with, restrains, or coerce you with respect to these rights.

WE WILL NOT promulgate, maintain or enforce any rule which prohibits our off-duty employees from engaging in union solicitation or the distribution of literature at any of the parking lots or other exterior areas of our Tipp City, Ohio distribution facility and Dayton, Ohio-area retail stores located at Harshman Road and in Kettering, Springboro Pike, Englewood, Beaver Creek, and Troy.

WE WILL NOT promulgate, maintain or enforce any rule prohibiting union solicitation by employees during working time, while simultaneously permitting certain types of union solicitation, for example, discussion relating to the Active Ballot Club campaign of the United Food and Commercial Workers Local 1099.

WE WILL rescind policy 079 in the team member handbook and a certain letter, dated October 20, 2003, from Matthew Jamrog to Robert Caldwell reaffirming that policy.

MEIJER, INC.